No. 89-913

In The

Supreme Court of the United States

October Term, 1989

ELWIN ETHERIDGE,

Petitioner,

v.

CHARLES S. ANDREWS AND
SHELBY S. ANDREWS, HIS WIFE,

Respondents.

On Petition For Writ Of Certiorari To The
Florida Fifth District Court Of Appeal

PETITIONER'S REPLY MEMORANDUM

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The response of the Andrews to the Petition before this Court demonstrates why the courts below erroneously ruled that Florida could constitutionally require Elwin Etheridge to defend a lawsuit in this State. Rather than answer the jurisdictional question posed, the Respondents have simply chosen to ignore it. Instead of resolving that issue, the Andrews have devoted a considerable portion of their brief to a discussion premised upon Florida's recognition of a gross negligence exception to its workers' compensation act and how the alleged conduct of Mr. Etheridge would fall within the parameters of Florida's Long-Arm Statute. With all due respect, the Respondents' argument simply misses the point which is raised in this petition.

The Respondents maintain that Florida courts have recognized a cause of action for gross negligence against a worker's co-employee. They further emphasize that Florida's Long-Arm Statute allows certain out-of-state defendants to be sued in Florida for certain specified conduct. This argument, however, does not address the constitutional factor to the exercise of jurisdiction over Mr. Etheridge in the overall jurisdictional equation. Whether their argument is based upon their legitimate confusion or, alternatively, a tacit concession of the correctness of Mr. Etheridge's argument, the fact remains that the Andrews have not demonstrated how Florida may constitutionally require Mr. Etheridge to defend the suit in Florida.

The Andrews have elected to emphasize the legal theory upon which they are attempting to recover and have overlooked the absence of any contacts between the

State of Florida and Elwin Etheridge. They have overlooked the fact that it was the corporate contacts with Florida that they relied upon in order to even argue an assertion of personal jurisdiction over Elwin Etheridge. The contacts with Florida were those of the corporation, not Mr. Etheridge's. Indeed, unlike the defendants in several of the cases that the Respondents have cited to the Court, Mr. Etheridge has never made so much as a phone call to the State of Florida. The mere fact that the allegations in their complaint may fall within the exception created by the Florida Supreme Court in *Streeter v. Sullivan*, 509 So.2d 268 (Fla. 1987), simply does not automatically confer jurisdiction in the Florida Courts over the person of Elwin Etheridge.

Illustration of this argument through the use of a hypothetical situation may be instructive. For example, the vice-president of a Florida corporation, who has absolutely no contacts with the State of Georgia, directs his secretary to go to Georgia to buy office supplies. The secretary follows this directive and while in Georgia runs over a pedestrian. Georgia has recently passed a law that imposes vicarious liability on fellow employees for the acts of their co-employees. Under the rationale advanced by the Respondents, it would not offend notions of due process to require the vice-president to defend any suit brought against him in a Georgia court. This would be true even though he had no "minimum contacts" with the State of Georgia. Such a result would be contrary to the well-settled principles that have been established over the years by this Court. The hypothetical Georgia statute may very well allow some plaintiff to state a cause of action against the Florida vice-president. That does not

mean, however, the statute can be used to constitutionally confer jurisdiction upon the Georgia courts over the non-resident corporate officer. Similarly, Florida may recognize a cause of action for gross negligence against a co-employee but that does not mean that this cause of action can be relied upon to constitutionally obtain jurisdiction over Elwin Etheridge.

The Respondents contend that for purposes of deciding whether this case warrants certiorari review, this Court should determine whether the facts of this case are similar to those in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) and *Calder v. Jones*, 465 U.S. 783 (1984). The respondents claim that like the defendants in *Keeton* and *Calder*, jurisdiction may be exercised over the person of non-resident Elwin Etheridge. The Andrews' reliance on *Keeton* and *Calder* is both misleading and misplaced. In *Keeton*, it was not seriously debated that the defendants "general course of conduct in circulating magazines throughout the state was purposefully directed at New Hampshire, and inevitably affected persons in the state." 465 U.S. at 774. This course of conduct was found to satisfy the "minimum contacts" needed between the defendant and the forum state. *Id.* The real issue in *Keeton* was whether the plaintiff's lack of contacts with the forum state could defeat jurisdiction that was otherwise proper under New Hampshire law and the due process clause. This Court held that a plaintiff's lack of contacts with a forum state will not automatically defeat jurisdiction *if the defendant has sufficient contacts with the forum state*. 465 U.S. 779-80.

The Respondents contend that this Court has rejected the argument that employees will be shielded from suit

when their acts are conducted within their official capacity. (Response at 15) This statement is misleading. Petitioner would point out that while this Court did state that employees who act in their official capacity will not necessarily be shielded from suit in their individual capacity, this Court also stated:

> But jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him; nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary. . . . *Each defendant's contacts with the forum State must be assessed individually.* . . . ('the requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction').

465 U.S. at 781-82 n. 13. (Citations omitted) (Emphasis supplied)

The Respondents' reliance on *Calder v. Jones* is also misplaced. In *Calder*, attention was again focused on the plaintiff's contacts with the forum state. This Court stated that "the plaintiff's lack of 'contacts' will not defeat otherwise proper jurisdiction, . . . but they may be so manifold as to permit jurisdiction when it would not exist in their absence. Here, the plaintiff is the focus of the activities of the defendants out of which the suit arises." 465 U.S. at 788. The record revealed that the alleged libelous story concerned the California activities of a California resident, that the article was drawn from California sources, and that the harm would be suffered in California. Based on all these factors, this Court concluded that "California is the focal point both of the story and of the harm suffered. Jurisdiction over Petitioners is therefore

proper in California based on the 'effects' of their Florida conduct in California." 465 U.S. at 789.

The Respondents contend that the question to be answered in this case is whether it is reasonable to expect that Elwin Etheridge knew, or should have known, that he would be called upon to answer in the Florida courts for injuries to fellow employees in Florida, caused by his out-of-state conduct. Given his lack of contacts with the State of Florida, the answer to that question must be no. The exercise of personal jurisdiction over Elwin Etheridge by the courts of Florida exceeds the limits of due process.

Respectfully submitted,

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